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Supreme Court of the United States

October Term, 1940

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN, as and constituting the Board of Department of Treasury of the State of Indiana,

Petitioners,

vs.

THE WOOD PRESERVING CORPORATION,

Respondent,

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S MEMORANDUM ON ADDITIONAL AUTHORITY

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RESPONDENT'S MEMORANDUM ON ADDITIONAL AUTHORITY

Just before the oral argument, petitioners filed an additional authority. In the argument, many of the questions of the Court were directed to the matter of allocation under Section 9(a), Ch. 50, Acts 1933 cited for the first time. The Section was not relied upon (a) before the Department on the claim for refund; or (b) before the District Court in either the pleadings, brief or argument; or (c) before the Circuit Court of Appeals in either the brief or argument.

Several answers to the application of this Section, which, because of the lateness of the hour of the service of the

additional authority on the respondent, were not well stated to the Court in oral argument nor in the typewritten memorandum filed by respondent immediately after the argument. We, therefore, wish to present briefly the points which relate to Section 9(a).

I. The Section was not in force when the assessment in this case was made.

Section 9(a) is a part of Ch. 50, Acts of 1933. That Act was amended completely, section by section, in 1937, and on April 1, 1937, these amendments became effective (Chapter 117, Acts of Indiana 1937). Section 10 of the '37 Act corresponds to Section 9 of the 1933 Act, but the italicized proviso in Section 9(a) set forth in the Petitioner's Additional Authority *was omitted from the 1937 Act.* Therefore, from and after April 1, 1937, this Section was no longer in force. The assessment made in this case against respondent was not made until August 6, 1937 (Record p. 21), over four months after the proviso clause as to apportionment had been repealed. The petitioners therefore rely upon a provision of the law not in force at the time of the assessment. *No provision for apportionment of any kind is contained in the 1937 Act.*

II. Section 9(a) of Chapter 50 of the Acts of 1933, while it did remain in force from May 1, 1933 to April 1, 1937, was never applied by the Department.

No regulations were ever issued providing for non-residents' report of their entire gross income and an allocation under the Section, nor did the forms provided by the Department make provision for allocation. The only form providing for allocation ever issued by the Department was Schedule E, Form 10, which provided

for the report of gross income from separate locations of business within the State. It was used for such typical operations as chain stores, oil companies and the like operating at several separate locations within the State. It was not used for or required to be filed by corporations in the situation of respondent. Corporations doing a national business were not required to report all of their gross income and appropriation to Indiana.

III. The Section was generally accepted as applying primarily to receipts derived from interstate business, and it was not at any time enforced.

Prior to the first collection date under the Gross Income Tax Act, which was July 1, 1933, the case of *J. D. Adams Manufacturing Co. v. Storen* (304 U. S. 307) was filed (June 10, 1933) in the Superior Court of Marion County, and that Court on June 28, 1933 entered a judgment holding that the Gross Income Tax Act could not be applied to receipts from interstate commerce (a decision ultimately affirmed by this Court). Immediately, the Department issued Temporary Regulation 190, which provided in part as follows:

> "Any taxpayer engaged in the business of manufacturing, wholesaling, jobbing or retailing who has gross receipts derived from interstate sales will not be required to include such receipts in any return already filed or to be filed prior to the time that the Supreme Court of Indiana shall render a decision in the case now pending, wherein J. D. Adams Manufacturing Company is plaintiff and the Department of Treasury is defendant."

Reporting of interstate receipts was thus deferred. Respondent has always claimed that the gross receipts here involved were from such a source. The *Adams case* was

not decided by the Supreme Court of Indiana until after the legislature of the State had repealed Section 9(a) as stated above. The Supreme Court of Indiana judgment was entered on April 30, 1937. Immediately after the Supreme Court decision, the Department of Treasury issued Temporary Regulation 3801, which revoked the Temporary Regulation 190 quoted above, and which provided that all taxpayers should report their "gross receipts" derived from "transactions in interstate commerce," but deferred the payment of the tax on such receipts until the decision of the *Adams case* by this Court. Immediately after the adoption of Temporary Regulation 3801, the Department of Treasury of the State of Indiana for the first time provided a form for the reporting of income derived from sources outside of the State, namely, in interstate commerce, and form 23(a) provided for a reporting of all income from May 1, 1933 to March 31, 1937 on the form.

It was undoubtedly upon the information received from this return that the Department of Treasury in this case made the assessment against this respondent on August 5, 1937.

The taxpayer in this case, therefore, was never required to report or to allocate income at any time while Section 9(a) was in force.

Further, it might be observed that if the Department had felt the taxpayer had intentionally disregarded Section 9(a) if it did apply, then the Department should have assessed the 10% penalty provided for in Section 10(c) of Ch. 50 of the Acts of 1933 which is mandatory in the event of intentional disregard "of authorized rules and regulations." No penalty was ever assessed in this case and it should be obvious that the Department regarded

that no violation of the provisions of this Section existed in the case of this respondent.

IV. No allocation ever permitted by Department.

The Department has never allocated receipts under Section 9(a). The Department of Treasury has always taken the position that the Act provided for a tax upon the *"entire receipts of the taxpayer."* It has relied upon the language of Section 3 of the Act which provides the rates at which the tax is to be assessed. Each of the several sub-sections of this Section repeats the phrase that the tax is imposed *"upon the entire gross income"* of the persons divided according to various classifications. This identical phrase *"upon the entire gross income"* is repeated five times in this Section. As recent as March 25, 1941, the Department of Treasury, in a written order in the case of *Koppers Company, Inc.*, an affiliated corporation of this respondent, in a case where proof was submitted as a basis for allocation, the Department ruled:

> "The Department is, therefore, compelled to hold that the taxpayer corporation was engaged in the performance of a construction contract within the State of Indiana, and the *entire gross receipts* therefrom are properly taxable under the provisions of the Gross Income Tax law, and there can be no division or separation of the gross receipts . . ."
>
> (Ruling Hearing Judge, Department of Treasury, March 25, 1941; taxpayer Koppers Company, Inc.; Account No. 93-23311).

To this position, the Department has always strictly adhered, and its public announcement of this position is apparent from the report on the adoption of the Uniform Regulation proposed by state tax enforcement officers following the decisions of the *McGoldrick v. Berwind-White*

Coal Mining Co. case, 309 U. S. 33, where Indiana tax officials refused to adopt the regulations because, as they stated in that ruling:

> "Under the Indiana Gross Income Tax Act we doubt if taxation can be predicated on mere delivery in the state and hence we attempt to tax foreign corporations on sales made into Indiana only when they are licensed in Indiana and maintain substantial offices or establishments in the state which are responsible for the sales being made."
>
> (November 29, 1940) (C. C. H. Interstate Sales Tax Service, par. 15-094).

The Courts of Indiana have given the Department support in the position. In fourteen cases decided by the appellate courts of the state, the Act has been treated as imposing a tax upon *total receipts* of the taxpayer without apportionment. In *Sioren v. Jasper County Farm Bureau Co-op. Assn.*, 103 Ind. App. 77, 81 (Dec. 17, 1937), the Appellate Court of the State summarized the position:

> "The act is known as the *Gross Income* Tax Act, *gross* having been defined to mean all. The act provides that there shall be imposed a tax 'measured by the amount or volume of gross income' and the term gross income is *specifically defined* in the act to mean 'the gross receipts of the taxpayer received as compensation' and that 'derived from trades, *businesses or commerce* and the gross receipts proceeding or accruing . . . and all receipts' and further with the evident expressed intention of the idea that the word gross should include everything added, in another section (in the classification of rates) that the tax shall be imposed upon the '*entire* gross income.' Thus it is evident that the result intended to be accomplished by this act was the taxation of 'the entire gross income' of those not specifically exempted." (Court's italics.)

V. The gross income tax is levied on total receipts of the taxpayer.

In the oral argument, the Attorney General admitted that the Gross Income Tax Act was modeled after the West Virginia law, but there are significant differences which go to the question of apportionment under the due process clause and to the question of jurisdiction to tax under that same clause. Undoubtedly the framers of the Indiana law had the West Virginia law before them, but the differences which were made by the framers deliberately in the drafting of the Indiana law are significant. The title of the West Virginia law, so far as pertinent here, is:

> "An Act to provide for the raising of additional public revenue by . . . providing for and imposing *a privilege tax upon the exercise of certain privileges in the State*, . . ." (Ch. 33, Laws of West Virginia, 1933).

Section 2 of this Act imposed a tax solely on "the value of the entire production manufactured" regardless of the point of delivery, thus bringing the law squarely within *American Manufacturing Co. vs. City of St. Louis* (1919), 250 U. S. 459, which was specifically held not applicable to the Indiana law by this Court in the *Adams case*. Also, the word "privilege" is used thirty-seven times, and the word "license" nine times, and the word "value' nine times, in the Virginia law, whereas in the Indiana law not one of these words is used a single time. The title of the Indiana Act is:

> "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income . . ."
>
> (Ch. 50, Acts of Indiana 1933.)

There are several other Acts of other States which used gross receipts as the measure of a "privilege" tax, but all of those laws have titles similar to the West Virginia statute and are couched clearly in the language of privilege just as in the case of the West Virginia statute. (*Cf.* Ch. 7, Laws of Arizona 1933; Ch. 119, Laws of Mississippi 1934; Ch. 7, Laws of New Mexico 1934; Ch. 14, Laws of South Dakota 1933; Ch. 191, Laws of Washington 1933). In all of these laws, the taxes are clearly levied upon a "privilege," are limited to the income from the exercise of that privilege, and licenses are granted for the exercise of the privilege, all of which the framers of the Indiana law carefully deleted. The tax in Indiana is imposed upon "all gross receipts of the taxpayer," whether derived from any business or occupation. It is a tax purely and simply upon all gross receipts of the taxpayer. An examination of these other laws makes it apparent that the Legislature of Indiana deliberately chose this form of tax, and there are many obvious advantages. Total receipts of the taxpayer, whether derived from his business or occupation, may be taxed, and even those who have no business or occupation may be taxed if they but have gross receipts.

The Act is, therefore, what this Court has said it was in the *Adams case.* As Justice Roberts said in that case:

> "The title of the Act declares that it is a revenue measure imposing a tax upon 'the receipt of gross income' . . . The regulations issued by the Department of Treasury, pursuant to authority granted by the Act, treat the exaction as a tax on gross receipts, and the Attorney General says in his brief that it is a privilege tax upon the receipt of gross income. We think this is a correct description. (*J. D. Adams Manufacturing Co. vs. Storen* (May 16, 1938), 304 U. S. 307, 309, 311.)

The Legislature has affirmed this construction by the amendment of the Act approved March 8, 1941 by the Legislature, which leaves the title still reading:

"An Act . . . imposing a tax upon the receipt of gross income . . ." (Ch. 40, Acts of Indiana 1941).

Conclusion

We therefore respectfully submit that for the foregoing reasons, Section 9(a) of Ch. 150, Acts of 1933, in no way affects the questions before this Court. It should be apparent that petitioners have never seriously considered that it did affect the case, because the question has never been raised in the three and one-half years that this case has been litigated until immediately prior to the call of the docket of this case on Monday, when the additional authority was filed with this Court.

We further submit that the Indiana Gross Income Tax Act, differing from all other State Laws, is purely a tax on the "entire gross receipts" of the taxpayer, and has been so construed by the Department, by the Courts of Indiana, and by this Court. In the application of this Act, this Court must presume that the Legislature has deliberately chosen a total gross receipts tax because of the advantage it has over occupation taxes measured by gross receipts. Therefore in the application of constitutional provisions, the inherent limitations of such a tax apparent from the briefs and the argument in this case must be presumed to have been weighed by the Legislature of the State and accepted by it. The courts should not rewrite the acts when the Legislature has failed to do so!

We, therefore, submit that—(a) there is a total lack of power in the State of Indiana to tax because the receipt was outside of the State (without effort at evasion (R. 80));

(b) even if there is power to tax, the tax has been l
without apportionment on activities both within and
out the state; and (c) the tax is a tax upon gross rec
capable of multiplication in the same form by Ohio, P
sylvania, Delaware, and all other States which the
merce may touch, and is squarely within the decisi
this Court in the *Adams case*.

Respectfully submitted,

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April 8, 1941.

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SUPREME COURT OF THE UNITED STATES.

No. 654.—October Term, 1940.

Department of Treasury of the State of Indiana, et al., etc., Petitioners,
vs.
The Wood Preserving Corporation.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 28, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought by respondent, The Wood Preserving Corporation, to recover taxes collected from it by the Department of Treasury of the State of Indiana under the Indiana Gross Income Tax Act of 1933. The District Court denied recovery and its judgment was reversed by the Circuit Court of Appeals upon the ground that the taxes were invalid under the Federal Constitution as laid upon income received outside the State and as constituting an unlawful burden upon interstate commerce. 114 F. (2d) 922. In view of the asserted conflict with applicable decisions of this Court, certiorari was granted. February 3, 1941.

The facts were found in accordance with the stipulation of the parties. Respondent is a Delaware corporation with its principal place of business at Pittsburgh, Pennsylvania. It is qualified to do business in Indiana but has no agents or employees within that State except as specified. Respondent is engaged in the business of treating railroad ties by creosoting them and also in the business of purchasing and selling ties. It does not, however, sell ties save to those with whom it has a contract for treatment.

The taxes in question were for the years 1934, 1935 and 1936. The taxes were laid upon respondent's gross receipts from the sale of ties to the Baltimore and Ohio Railroad Company in accordance with certain contracts. One contract required the Railroad Company to deliver for treatment 600,000 ties annually to a treatment plant at Finney, Ohio, belonging (through a subsidiary) to respondent. The other provided for the sale of raw ties to the Rail-

road Company, delivered f. o. b. cars on the railroad tracks; also for treatment of ties at another plant to be operated by respondent (under lease from the Railroad Company) in West Virginia. A supplemental agreement required respondent to ship all ties delivered to the railroad in territory west of the Ohio River, including Indiana, to the plant at Finney, Ohio, for treatment. Respondent sold to the Railroad Company no ties that were not to be treated at one or the other of its plants before use.

The course of business, so far as material here, was as follows: Respondent itself produced no ties in Indiana. Requisitions for ties were issued from the Railroad Company's office in Baltimore and were accepted at respondent's office in Marietta, Ohio, by telephone or mail. Respondent then procured the ties from local producers in Indiana through communications by telephone or mail from its Marietta office. The Indiana vendors delivered the ties at loading points on the railroad in Indiana. When the ties were ready, an inspector for the Railroad Company and respondent's agent met at the loading point in Indiana, and as the ties were examined with respect to compliance with specifications, those accepted by the railroad inspector were loaded on freight cars furnished by the Railroad Company at the loading point. The inspection and loading were simultaneous. Respondent paid the Indiana producers only for ties which were thus accepted. Respondent's agent made out bills of lading with respondent as consignor and the Railroad Company's Chief Engineer of Maintennace at Finney, Ohio, as consignee, and the ties were carried to Finney, Ohio, for treatment. Respondent paid no freight to the Railroad Company for that transportation. Respondent's office at Marietta mailed weekly invoices to the Railroad Company at its Baltimore office for the ties sold and delivered to the Railroad Company and monthly reports of such invoices were made to respondent's main office at Pittsburgh. All payments for ties were made to respondent's Pittsburgh office and were there deposited in bank.

The taxes in question were laid by the Indiana authorities on the receipts which respondent derived from the sale of the untreated ties. These receipts did not include charges for the creosoting treatment; those charges were separately billed by respondent's subsidiary when the treatment was completed.

Section 2 of the Indiana Taxing Act of 1933, the text of which is set forth in the margin,[1] provides for a tax upon gross income "derived from sources within the State of Indiana" of all non-resident persons and corporations. The court below has held that under this statute the thing taxed was "the receipt of gross income" and as the income in question was received by respondent in Pennsylvania, it was beyond the jurisdiction of Indiana; that, if the contrary theory of the taxing officials was sound, still the tax was invalid because no method was provided for allocating the tax to the income derived from that part of the business transacted within Indiana; and, further, that the transactions in question "were had in interstate commerce", that the tax discriminated against that commerce and for that reason was void.

We think that the court was in error in each of these conclusions.

As to the first point, the court relied upon our decision in *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307. That was a case under the same taxing act of Indiana, but there the tax was applied to gross receipts derived by an Indiana corporation from sales in other States of goods manufactured in Indiana. We observed that the tax is not an excise for the privilege of domicile "since it is levied upon the gross income of non-residents from sources within the State". The point of the decision was that "the tax is what it purports to be,—a tax upon gross receipts from commerce", and that the tax was there laid upon receipts from sales to customers in other States and abroad which constituted interstate and foreign commerce. *Id.*, pp. 310, 311.

The present question is as to the validity of the tax upon receipts "derived from sources within the State",[2] that is, under Section 2

[1] Section 2 of Chapter 50 of the Acts of 1933 of Indiana is as follows:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided". 11 Burns Indiana Statutes, sec. 64-2602.

[2] See Miles v. Department of Treasury, 209 Ind. 172, 188; Indiana Creosoting Co. v. McNutt, 210 Ind. 656, 663, 664.

of the Act, from activities which petitioners insist were intrastate. If petitioners are right in this contention there can be no doubt that Indiana had authority to lay the tax. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120, 121; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 648, 649; *National Leather Co.* v. *Massachusetts*, 277 U. S. 413, 423; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 134; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 161; *Dravo Contracting Co.* v. *James*, 114 F. (2d) 242, 247. Compare *Wisconsin* v. *J. C. Penney Co.*, No. 46 (decided December 16, 1940. In that view, it cannot be said that respondent had a constitutional right to escape that burden by arranging to have the proceeds of its intrastate transactions paid to it in another State. *Underwood Typewriter Co.* v. *Chamberlain, supra*, p. 120; *Continental Assurance Co.* v. *Tennessee*, 311 U. S. 5.

Further, as the sole subject of the challenged tax is the income derived from respondent's sales to the Railroad Company there is no occasion for apportionment. The creosoting operations in Ohio, and the income derived from them, were not involved. And the fact that the ties which were sold to the Railroad Company were purchased by respondent through orders given to the Indiana producers from respondent's Marietta office cannot affect the authority of Indiana to tax the receipts from intrastate activities of respondent in its dealings with the Railroad Company. *Woodruff* v. *Parham*, 8 Wall. 123, 140; *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, 175.

As to these dealings, it appears that respondent received in Indiana the ties it purchased from the local producers and that respondent sold and delivered these ties in Indiana to the Railroad Company. The fact that the delivery by the producers to respondent and respondent's delivery to the Railroad Company took place at the same time is not important. Respondent was in Indiana acting through its agent at the designated points on the railroad line. The Railroad Company was at the same points represented by its inspector. The ties brought there by the producers were then examined and those found by the inspector to be in accordance with specifications were accepted. In these transactions, respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and delivered these ties to the Railroad Company. These

were local transactions,—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana. See *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390.

We find no ground for saying that in taxing the receipts from these local transactions Indiana has exceeded its constitutional authority by taxing interstate commerce or discriminating against it.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END